2010

State of Utah v. Leonel Garcia-Vargas, Jr. : Appellant's Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
LEONEL GARCIA-VARGAS, JR.,	:	Case No. 20100996-CA Defendant is incarcerated.
Defendant/Appellant.	:	

APPELLANT'S REPLY BRIEF

Appeal from a judgment of conviction for one count of Robbery, a second degree felony, in violation of Utah Code section 76-6-301, one count of Aggravated Robbery, a first degree felony, in violation of Utah Code section 76-6-302, and one count of Possession of Burglary Tools, a Class B Misdemeanor, in violation of Utah Code section 76-6-205, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Ann Boyden, presiding.

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INTRODUCTION

Mr. Vargas Garcia was entitled to jury instructions on theft, assault, and aggravated assault because those offenses are included in robbery and aggravated robbery and there is a rational basis in the evidence to convict Mr. Vargas Garcia of those lesser offenses and acquit him of the charged offenses. When the court denied Mr. Vargas Garcia's request for those instructions, it committed harmful error.

Based on Mr. Vargas Garcia's version of events, he stole cell phones from a garage where the owners could not see him. When he then went inside the house with someone named Freakin' Freddy to initiate a drug deal with the owners of the phones, Freakin' Freddy unexpectedly began attacking them, demanding drugs. In the ensuing melee, Mr. Vargas Garcia used force against each of the house's occupants. Based on this version of events, there is a rational basis to acquit Mr. Vargas Garcia of robbery and aggravated robbery, but convict him of assault and theft because any force he used was not used "in the commission" of the theft of the cell phones as the robbery statute

requires. The State's arguments notwithstanding, the robbery statute's plain language requires more than mere proximity in time and place between the theft and the force used; "in the commission" denotes a transactional relationship—to constitute robbery, the force must be used in the same transaction as the theft to help effect the theft. Further, there was a rational basis to acquit Mr. Vargas Garcia of intentionally aiding Freakin' Freddy in robbery because, under Mr. Vargas Garcia's version of events, he was there for a drug deal and never intended that a robbery take place. There was a rational basis to conclude that any force Mr. Vargas Garcia used was used to protect himself and not to aid Freakin' Freddy in committing a robbery.

Further, when the court denied Mr. Vargas Garcia's request for jury instructions, it denied Mr. Vargas Garcia the opportunity of presenting his theory of the case to the jury and committed harmful error. The jury never had the opportunity of deciding between whether Mr. Vargas Garcia used force in the commission of theft (which would constitute robbery or aggravated robbery) or whether he committed the lesser offense of theft followed by assault. They had to either follow the State's version of events or acquit Mr. Vargas Garcia of all crimes—a result that would have been unwarranted based on his own admissions. The fact that the jury received instructions on robbery and aggravated robbery, neither of which was Mr. Vargas Garcia's theory, and chose to convict him of aggravated robbery in one instance does not mean the jury would not have convicted of theft and assault or theft and aggravated assault had it received those instructions. Further, the evidence against Mr. Vargas Garcia, primarily the testimony of the two complaining witnesses who Mr. Vargas Garcia alleged to be drug dealers, was not so

compelling as to render harmless the trial court's error in failing to offer the lesser-included instructions. Mr. Vargas Garcia's version of events—one in which he admitted to several crimes—was not self-serving and was corroborated by evidence. Accordingly, because there was a rational basis for Mr. Vargas Garcia's requested lesser-included instructions and the trial court committed harmful error when it denied his request, this Court should reverse Mr. Vargas Garcia's convictions.

ARGUMENT

I. There Was a Rational Basis to Acquit Mr. Vargas Garcia of Aggravated Robbery and Convict Him of the Lesser-Included Offenses of Theft and Assault or Aggravated Assault Because Any Assault Committed by Mr. Vargas Garcia Was Not Committed in the Course of Committing a Theft.

According to Mr. Vargas Garcia's version of events, he did not use force in the course of stealing from the victims. A defendant is entitled to a lesser-included offense instruction when (1) the lesser offense is included in the charged offense, and (2) the evidence offered provides "a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." State v. Kruger, 2000 UT 60, ¶¶ 12–13, 6 P.3d 1116. The State does not dispute that theft, assault, and aggravated assault are included in robbery and aggravated robbery, but argues that the second prong is not met. Br. Appellee at 9. Mr. Vargas Garcia has met the second prong because, based on his version of events, (a) any assaultive actions inside the house were not "in the commission of" a theft and (b) he lacked the requisite intent for accomplice liability for Freakin' Freddy's actions.

A. A Lesser-Included Offense Instruction for Theft Was Required Because Mr. Vargas Garcia's Use of Force Was Not in the Course of the Theft of the Cell Phones.

The plain language of the robbery statute makes clear that the "force or fear" necessary to the offense must be committed "in the course of" committing theft, Utah Code Ann. § 76-6-301, not just "closely proximate in time and distance," Br. Appellee at 22. The statute defines "in the course of" to include: "(a) in the course of an attempt to commit theft or wrongful appropriation; (b) in the commission of theft or wrongful appropriation; or (c) in the immediate flight after attempt or commission." Utah Code Ann. § 76-6-301(2)(a)-(c). According to Mr. Vargas Garcia's version of events, he had completed the wrongful appropriation of the cell phones in the garage before entering the house and, because he had concealed the cell phones without being seen, "immediate flight" after the offense was never necessary and never took place.

Contrary to the State's argument, the statutory phrase "in the course of committing" should not be interpreted in the same way that Utah courts have interpreted the phrase "while . . . in the commission of" in the context of aggravated murder. Br. Appellee at 21. The State cites a series of cases interpreting the now amended[1] Utah aggravated murder statute to include aggravating acts that are part of "a continuing chain of events" that are in "close proximity in terms of time and distance," but not necessarily causally related to the murder. State v. Archuleta, 850 P.2d 1232, 1244–45 (Utah 1993);

[1] The current version of the aggravated murder statute bears different language: "the homicide was committed incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit" one of the listed crimes. Utah Code Ann. § 76-5-202(1)(d) (West 2011).

see State v. Graham, 2006 UT 43, ¶¶ 31–35, 143 P.3d 268; State v. Johnson, 740 P.2d 1264, 1268 (Utah 1987); see also Utah Code Ann. § 76-5-202(1)(d) (1990). But the phrases are distinguishable. It is unnecessary for this Court to look to an unrelated statute with different language to interpret the robbery statute when the plain language makes the correct interpretation clear. See State v. Alfatlawi, 2006 UT App 511, ¶ 40, 153 P.3d 804 ("Where the statutory language is plain and unambiguous, we do not look beyond the language's plain meaning to divine legislative intent." (internal quotation marks omitted)). "In the course of" denotes a close relationship between the force and the theft. Utah Code Ann. § 76-6-301 (2008). The legislature chose the phrases "in the course of" and "in the commission of," not "while in the commission of" or "during the commission of," indicating that the force used must be a part of the theft itself, i.e., attaining possession of the stolen property, resisting apprehension, or facilitating escape, rather than just occurring at a similar time and place. The plain language of the robbery statute is clear that "in the course of committing theft" means not just around the time or place of the theft, but "*in* the commission of" a theft or in immediate flight afterwards. Utah Code Ann. § 76-6-301 (emphasis added).

Notably, per Mr. Vargas Garcia, he was never in "immediate flight" after the theft in the garage. The State suggests that Mr. Vargas Garcia's actions inside the house occurred during a flight from his theft of the cell phones because he did not reach a place of temporary safety. Br. Appellee at 26. This argument lacks merit. Mr. Vargas Garcia pocketed the phones in the garage where he knew no one observed him. Instead of leaving the scene (conforming to the plain meaning of "flee"), he claims he remained and

entered the home to complete a drug deal with the owners of the phones, whom he knew were unaware of his theft. R. 144:40. In the mind of Mr. Vargas Garcia there was no need to flee because he was already in a place of safety—he had obtained control over the phones and no one knew of his theft. Neither is the State's argument that there was "no break in the chain of events" availing. To the contrary, Freakin' Freddy's intervening, unexpected, and unprovoked violence is a clear break in the chain of events. R. 144:41.

Even if the plain meaning of the robbery statute were ambiguous, the legislative history makes clear that the statute was not intended to be so broad as to include unrelated force that occurs close in time or place to a theft. Prior to its amendment, Utah Code section 76-6-301 defined robbery as "the unlawful and intentional taking of personal property in the possession of another . . . against his will, accomplished by means of force or fear." Utah Code Ann. § 76-6-301 (1995) (emphasis added). The legislature later amended the statute to clarify that "accomplished by" includes force used later in the theft transaction as long as it is still for the purpose of effecting the theft. See State in Interest of D.B., 925 P.2d 178, 180–81, 182 n.5 (Utah 1996). In fact, Representative Larsen stated that the purpose of the amendment was a "technical change in the definition of robbery" to include situations "where force or fear is used to actually maintain the possession of stolen property." See Br. Appellee Addendum D; Tape of Utah House Floor Debates, 51st Legislature, General Session (March 1, 1995) (statement of Rep. Patricia Larsen). She used the example of a shoplifter threatening and hitting an employee who was attempting to recover the stolen item. Id.

The State's reading of the statute goes far beyond Representative Larsen's expressed intent. It would define robbery as force used proximate in time and place to a theft — regardless of the circumstances that brought about the force, who the force was used against, and whether there was an intervening reason for the force. A shoplifter pocketing a candy bar who uses force to stop a shopper from beating his child would be guilty of robbery under the State's proposed interpretation.

To arrive at this interpretation, the State relies on case law interpreting now-amended language from an unrelated aggravated murder statute. See Br. Appellee at 21–22 (citing Archuleta, 850 P.2d at 1244–45). At the time of Archuleta, the aggravated murder statute required that the murder occurred "while . . . in the commission of" another crime listed. Archuleta, 850 P.2d 1232, 1244 n.44 (citing Utah Code Ann. § 76-5-202(1)(d) (1990)). Utah courts interpreted this language to include crimes that are part of the same series of crimes occurring close in time and place, regardless of their causal connection to the murder itself. See State v. Tillman, 750 P.2d 546, 565, 570–71 (Utah 1987) (holding that the statute includes aggravating crimes that are "merely incidental to" and independent of the murder because the "legislature considered certain intentional killings to be especially reprehensible . . . [where] the killer contemporaneously committed other serious acts"). However, Utah courts have consistently treated the force used in robbery differently from the felonies that aggravate a murder. Utah courts, even before the 1995 amendment took effect, implicitly acknowledged that robbery in Utah is a transactional crime, and that force must be used to complete the theft transaction to constitute robbery. See, e.g., State v. Ulibarri, 668 P.2d 568, 569 (Utah 1983) (finding

robbery where defendant used threat of force to maintain possession of beer when store clerk called for payment); State in Interest of D.B., 925 P.2d at 180–82 (Utah Ct. App. 1996) (finding robbery where defendant used force to maintain possession of pager and dissuade the owner from seeking its return); State v. Irvin, 2007 UT App 319, ¶ 19, 169 P.3d 798 (finding robbery where defendant used threat of force to gain possession of cash and then car keys to facilitate his escape). In other words, robbery is a theft that is forceful, while aggravated murder can be a murder that happened close in time to some other, unrelated felony. For this reason, the State's attempt at analogizing the statutory language between the two crimes fails.

Finally, statutes with more similar language provide greater insight than Utah's former aggravated murder statute. The State quotes only the phrase "in the commission of" from the former aggravated murder statute, which provided, "the homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempt to commit" a list of crimes. Utah Code Ann. § 76-5-202 (2005) (emphasis added); see Archuleta, 850 P.2d at 1244 n.44, 1245 ("the phrase 'while committing' denotes a continuous chain of events"). The robbery statute does not include the word "while" and does not denote a continuous chain of events, only acts more directly "in the course" or "in the commission" of the theft itself. A better example of the court interpreting similar statutory language is Utah Code section 34A-2-401 (2005), which states: "An employee . . . who is injured . . . by accident arising out of and in the course of . . . employment . . . shall be paid[ ]compensation for loss sustained on account of the injury. . . ." This court has stated:

> [U]nder Utah law, an accident occurs "in the course of" employment when it occurs while the employee is rendering services to his employer which he was hired to do or something incidental thereto, at the time when and the place where he was authorized to render such service. An activity is incidental to the employee's employment if it advances, directly or indirectly, his employer's interests.

Ae Clevite, Inc. v. Labor Comm'n, 2000 UT App 35 ¶ 9, 996 P.2d 1072 (citations omitted) (internal quotation marks omitted); see also Henderson v. Labor Comm'n, 2011 UT App 127, ¶ 3, 253 P.3d 1115 ("the language 'arising out of or in the course of employment' requires that there be a causal connection between the injury and the employment" (quoting Allen v. Industrial Comm'n, 729 P.2d 15, 18 (Utah 1986)); Black's Law Dictionary (9th ed. 2009) (defining acts in "the course of employment," to include events and circumstances that exist "as a part of one's employment; especially, the time during which an employee furthers an employer's goals through employer-mandated directives"). "In the course of" employment means more than proximate in time or space, and must advance the purpose of employment. Similarly "in the course of" theft denotes an act that is part of the theft or that is done to advance or effect the theft.

Given the transactional nature of robbery in Utah, there was sufficient evidence at trial to create a rational basis to acquit Mr. Vargas Garcia of aggravated robbery and convict of the lesser-included offense of theft. When Mr. Vargas Garcia took the cell phones from the garage and concealed them without being noticed, he completed the transaction of theft. R. 144:40; see State v. Eagle, 611 P.2d 1211, 1213 (Utah 1980). After that transaction, he remained at the house to complete a drug deal inside. R. 144:40–41. Then Freakin' Freddy unilaterally, and to Mr. Vargas Garcia's complete

surprise, instigated a separate criminal transaction in which he began ransacking the home and assaulting the inhabitants. R. 144:41–42. During the ensuing melee, Mr. Vargas Garcia was hit by Mr. Tellez and responded by punching him, and later threw a cell phone at Mr. Sanchez. R. 144:42-44. These two acts, although close in time and location to the theft in the garage, were clearly a result of the new, intervening transaction instigated by Freakin' Freddy.[2] They were wholly unrelated to the theft of the cell phones. Therefore, there was a rational basis to conclude that the theft in the garage and the events in the house were not part of the same transaction, and that Mr. Vargas Garcia was entitled to a lesser-included offense instruction for theft.

B. Lesser-Included Offense Instructions for Assault and Aggravated Assault Were Required Because Mr. Vargas Garcia Lacked the Intent Necessary for Accomplice Liability.

According to his account of events, Mr. Vargas Garcia did not intend to aid Freakin' Freddy in a robbery. The State argues that there was no rational basis to acquit Mr. Vargas Garcia of aggravated robbery and convict him of assault because he "intentionally helped" Freakin' Freddy rob Mr. Tellez and Mr. Sanchez. Br. Appellee at 19. Utah's accomplice liability statute provides that a "person, acting with the mental state required for the commission of an offense who . . . intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct." Utah Code Ann. § 76-2-202 (2008). To hold a defendant liable as an accomplice, the State must show two things. First, it must show that the defendant had

[2] Because of the separate nature of these actions, Mr. Vargas Garcia was entitled to a lesser-included offense instructions on assault and aggravated assault as well. See infra Part I.B.

the intent that the underlying offense be committed, and second, that the defendant had the intent to aid the principal actor in the offense. State v. Briggs, 2008 UT 75, ¶ 13, 197 P.3d 628. "[W]here the defendant is charged with aiding another in the commission of the offense, the accomplice liability statute requires that the defendant's aiding be 'intentional.'" State v. Jeffs, 2010 UT 49, ¶ 50, 243 P.3d 1250 (citing Utah Code Ann. § 76-2-202).

Mr. Vargas Garcia did inform Freakin' Freddy when Mr. Tellez began to get up, telling Freakin' Freddy that "they needed to get out of there." Br. Appellee at 19–20. However, for Mr. Vargas Garcia to be liable as an accomplice, he must have intended that a robbery take place. Briggs, 2008 UT 75, ¶ 13. There was a rational basis in the evidence for a jury to determine that Mr. Vargas Garcia lacked this intent. Mr. Vargas Garcia's account of the events explained that he believed that they were entering the house to buy methamphetamine. R. 144:38. Upon entering with that intention, Mr. Vargas Garcia was surprised when Freakin' Freddy began ransacking the home and demanding drugs. R. 144:28–29, 41. Mr. Vargas Garcia did not know what to do, but he complied with Freakin' Freddy's instructions to watch Mr. Tellez. R. 144:30, 42. However, Mr. Vargas Garcia had no idea that Freakin' Freddy planned to use force and Mr. Vargas Garcia never intended for a robbery to take place. Mr. Vargas Garcia found himself forced into a violent situation where he could have been assaulted by the people in the house or by Freakin' Freddy himself. A jury could believe that Mr. Vargas Garcia's actions were intended only to protect himself from two drug dealers and a drug addict he had just met, not to commit robbery. Mr. Vargas Garcia said he saw Freakin'

Freddy freak out, but never said he saw Freakin' Freddy take anything from the house. R. 144:414–6. Mr. Vargas Garcia claims he stopped Freakin' Freddy from further assaulting Mr. Tellez by convincing him that they needed to leave. R. 144:43. Given the evidence presented at trial, there was a rational basis to believe that Mr. Vargas Garcia lacked the intent necessary for accomplice liability for robbery and aggravated robbery. For this reason he was entitled to a lesser-included offense instruction for assault and aggravated assault.

II. The Trial Court's Error in Denying Lesser-Included Offense Instructions Was Not Harmless Because, Given the Requested Instructions, It Is Reasonably Likely the Jury Would Have Considered Theft and Aggravated Assault the Proper Verdict.

The errors in instructing the jury were not harmless. The jury's decision to convict Mr. Vargas Garcia of aggravated robbery when the lesser-included offense instruction of robbery was also provided is not proof that the omission of theft and aggravated assault instructions did not affect the verdict. The omission forced the jury to convict based on the State's theory of the case or to acquit Mr. Vargas Garcia entirely despite his admissions of theft. Neither was the evidence, which consisted of the testimony of the two victims, so overwhelming that the court's error was harmless.

A. The Jury's Verdict of Aggravated Robbery Does Not Prove It Would Have Rejected a Theft and Aggravated Assault Conviction.

A verdict of aggravated robbery does not prove that the court's failure to instruct the jury on theft and assault was harmless. "[H]armless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the

outcome of the proceedings." State v. Evans, 2001 UT 22, ¶ 20, 20 P.3d 888. Although the jury was instructed on both robbery and aggravated robbery, it received no instructions that would have permitted it the opportunity legitimately to consider the connection between the theft and the force and to convict Mr. Vargas Garcia of only the offenses he acknowledged committing. Schad v. Arizona, 501 U.S. 624, 647 (1991), and State v. Daniels, 2002 UT 2, ¶¶ 27–29, 40 P.3d 611, are not persuasive authority on this point because the jury in this case, in convicting of aggravated robbery, was likely reacting to the aggravated nature of the assaults that occurred, not considering their relation to the earlier theft, and there was a "reasonable likelihood" that they would have found differently had they received the lesser-included instructions. See Br. Appellee at 28-29.

Utah case law is clear that the denial of a defendant's requested lesser-included offense instructions can constitute reversible error, even if the jury received other lesser-included offense instructions. The State's contention that instruction on robbery cures the court's failure to instruct on theft, assault, and aggravated assault is incorrect. In State v. Hansen, the Utah Supreme Court remanded a conviction of first degree murder because the trial court rejected a felony murder instruction that conformed to the defendant's version of the events. 734 P.2d 421, 422 (Utah 1986). The Court determined the error was not harmless even though the jury received other lesser-included offense instructions. Id. In that case, Hansen had helped to tie up a victim in order to steal from him before, according to Hansen's version of the events, his codefendant set the house on fire. Hansen denied being present when the fire was set or having any intent or knowledge that

the victim would be killed as a result. Id. Along with an instruction for first degree murder, the "jury was given a felony-murder instruction based on an unintentional killing occurring during an arson and a manslaughter instruction based on a killing caused by a recklessly set fire." Id. at 428. The jury was not, however given a felony murder instruction based on robbery or burglary. Id. The Court rejected the State's claim that the jury's verdict of first degree murder indicated that Hansen must have acted with the requisite knowledge or intent to kill. The Court reasoned that, because there were no instructions that conformed to the defendant's assertion that he did not start the fire but had committed burglary and robbery, the jury's

> only choice was to find that he was responsible for the fire that caused the death or to acquit him altogether. This is exactly the sort of forced choice that lesser included offense instructions are designed to avoid, and exactly the choice that the jury would not have had to make if Hansen's burglary or robbery-based felony-murder instruction had been given. Therefore, we cannot find that the refusal to give the instruction was harmless.

Id. The State's contention that instruction on any lesser-included offense ensures harmless error is therefore false. In Mr. Vargas Garcia's case, the jury was presented with a forced choice similar to that in Hansen: either Mr. Vargas Garcia had robbed the victims or he should be acquitted altogether. A total acquittal, however, would be unjust under Mr. Vargas Garcia's own version of events. The court denied the jury the option of accepting Mr. Vargas Garcia's version of events: that although he had stolen the cell phones, any force used later was not used in the course of that theft.

Furthermore, the jury's decision to convict of aggravated robbery when a robbery instruction was also given is more likely based on the injuries the victims sustained than

on the relatedness of the theft to those injuries. The jury's options in Mr. Vargas Garcia's trial were guilty of robbery, guilty of aggravated robbery, and not guilty. The jury heard evidence of Freakin' Freddy's assaults on Mr. Tellez and Mr. Sanchez. It heard evidence of the injuries the victims sustained. It also heard evidence that Mr. Vargas Garcia admitted to the theft of the cell phones and to punching Mr. Tellez and throwing a cell phone at Mr. Sanchez. A jury is likely to be moved by the loss and injuries the victims sustained, Mr. Vargas Garcia's admission that he threw a cell phone at one of the victims, and Mr. Vargas Garcia's association with Freakin' Freddy. Absent an instruction on assault and theft, the jurors faced a forced choice that did not provide them sufficient opportunity to consider whether Mr. Vargas Garcia's actions inside the house were related to his initial theft. Had the jury received the requested instructions, it is reasonably likely that it would have convicted Mr. Vargas Garcia of theft and aggravated assault instead of aggravated robbery.

B. The Evidence of Aggravated Robbery Was Not So Overwhelming as to Render Harmless the Failure to Instruct on Lesser-Included Offenses.

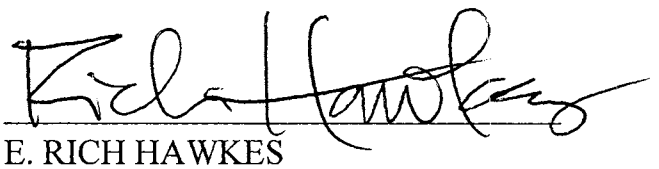
The evidence presented at trial in support of aggravated robbery was not, as the State claims, so overwhelming that any error in the instructions was harmless. The State cites State v. Evans, 2001 UT 22, 20 P.3d 888, an attempted aggravated murder case in which the Utah Supreme Court found that error in failing to instruct the jury on attempted aggravated manslaughter was harmless. Br.Appellee at 31–32. The Evans court determined that there was no reasonable likelihood that the error changed the outcome of the trial because the only evidence in support of attempted aggravated manslaughter was

the defendant's own testimony that he did not know the man approaching him was a police officer. Evans, 2001 UT 22, ¶¶ 12, 21–22. The evidence in support of attempted aggravated murder in that case was substantial, including at least eight eyewitnesses to the event who saw the flashing police lights and testimony from a passenger in the vehicle that the defendant said "we're getting pulled over." Id. ¶ 21. In contrast, the jury in this case heard from the two victims, alleged drug dealers, and no unbiased eye witnesses. Mr. Vargas Garcia's version of the events on October 23, 2009, was not the only evidence in support of theft and assault or aggravated assault. The physical evidence recovered by the police supported Mr. Vargas Garcia's testimony: no cash, jewelry, camera, or bloody 9-inch weapon to corroborate the story of the victims was found. R. 143:192–93, 195. Furthermore, the victims' testimony was of questionable credibility because both of them failed to mention in their original statements to the police that the assailants had used a knife. R. 143:131, 168. Because the victims' testimony was unreliable and the physical evidence supported Mr. Vargas Garcia's account, it was reasonably likely that the outcome could have been different had the jury been given instructions on theft, assault and aggravated assault.

CONCLUSION

Because, according to Mr. Vargas Garcia's version of events, he was not guilty of robbery, but of the lesser included offenses of theft and assault, the court erred when it denied his request for those instructions and the error was not harmless. This Court should reverse his convictions and remand for a new trial so that the jury may consider the lesser offenses.

SUBMITTED this 19 day of December, 2011.



E. RICH HAWKES
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, E. Rich Hawkes, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 19 day of December, 2011.

E. RICH HAWKES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this _____ day of December, 2011.

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